

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

**Determination of Royalty Rates and
Terms for Making and Distributing
Phonorecords
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

**AMAZON’S AND APPLE’S MOTION TO IMMEDIATELY MODIFY THE JUDGES’
INTERIM ORDER REGARDING BMI LICENSE AGREEMENTS**

Over four months ago, the Judges temporarily barred the Services from producing any “BMI License Agreements to each other until the Judges rule on BMI’s Protective Order Motion.”¹ The Judges issued that order, binding each Service, even though BMI disclaimed any objection to Amazon’s or Apple’s outside counsel receiving access to those materials. Amazon and Apple (the “Movants”) now request that the Judges modify that Interim Order to permit the production of the BMI License Agreements² to their outside counsel. The Movants agree, while BMI’s underlying motion remains pending, to refrain from disclosing any BMI License Agreements to the other parties whose attorneys are the target of BMI’s underlying motion.

With the April 1 rebuttal deadline fast approaching, immediate relief is necessary for the Movants to prepare their rebuttal submissions. The Copyright Owners now possess most of the Services’ BMI License Agreements, while the Services’ counsel do not. The resulting

¹ See Order Granting Emergency Mot. and Extending Stay of Services’ Produc. of BMI License Agreements at 2 (Sept. 29, 2021) (“Interim Order”). “BMI” refers to Broadcast Music, Inc. BMI’s underlying motion has been pending for more than four months. See BMI’s Mot. for a Limited Modification to the Protective Order in the *Phonorecords IV* Proceeding (Sept. 15, 2021) (“BMI Motion”).

² This term refers to license agreements between BMI on the one hand, and Spotify, Amazon, Pandora, Apple, or Google (collectively, the “Services”), on the other. As Amazon has understood it, it also applies to testimony or other documents disclosing the terms of those agreements.

asymmetry is unnecessary, unfair, and inconsistent with core discovery principles. Neither BMI³ nor the Copyright Owners⁴ oppose the relief the Movants seek here. Continuing to bar the Movants' counsel from reviewing other Services' BMI materials needlessly prejudices both Movants. The Judges should immediately modify the Interim Order to eliminate that prejudice.⁵

ARGUMENT

On September 15, 2021, BMI – a non-participant – asked the Judges to prohibit the production of BMI's License Agreements unless three particular attorneys (who do not represent Movants) are prohibited from viewing those agreements. *See* BMI Motion at 1-2; *see also* BMI Emergency Mot. Barring Services' from Produc. BMI License Agreements to Each Other Until Judges Rule on BMI's Pending Mot. at 2 (Sept. 23, 2021). The Services, including Amazon, opposed the motion, arguing that the limitations were unwarranted. On September 29, 2021, the Judges entered the Interim Order, which prohibits the disclosure of the BMI License Agreements to any Service – even the ones whose access BMI never opposed – until the Judges rule on the BMI Motion. The BMI Motion remains pending before the Judges.

All participants agree that the BMI License Agreements are relevant to this proceeding. Indeed, they are referenced in multiple participants' Written Direct Statements and directly implicate the benchmarking analysis that several experts performed. *See, e.g.*, Written Direct

³ BMI states its position as follows: "BMI does not oppose the relief sought by Movants, provided any relief granted does not prejudice BMI's Motion for a Limited Modification of the Protective Order."

⁴ The Copyright Owners state their position as follows: "Copyright Owners do not oppose the requested relief, and have communicated their position that the relief sought should further clarify that production of the BMI agreements is required to all participants not implicated by the pending BMI motion. Google and Pandora continue to withhold production of their BMI agreements even from Copyright Owners, citing the Interim Order, despite the fact that the Interim Order does not provide for such withholding."

⁵ Google, Pandora, and Spotify (the "opposing Services") oppose this motion. These three Services have asserted no substantive objection to the Movants gaining access to the BMI License Agreements. Instead, their objection appears to be premised on their opposition to BMI's underlying motion. Amazon joined in that opposition and continues to believe that the Judges should deny BMI's motion. But barring that, the Interim Order should be modified to eliminate the unnecessary screen as it applies to Amazon and Apple specifically. *Infra* p. 4 (discussing these Services' opposition).

Testimony of Amy Braun ¶¶ 52-55; Written Direct Testimony of Leslie Marx ¶ 208; Written Direct Testimony of Joseph Farrell ¶¶ 119-121. However, because of the Interim Order, Amazon’s and Apple’s outside counsel and experts have been unable to review the other Services’ BMI agreements or the testimony regarding those agreements. Conversely, Amazon, Apple, and Spotify have produced their BMI materials to the Copyright Owners’ outside counsel – but not to any other Service, because the Interim Order on its face only prohibits the Services from producing BMI materials “to each other.”⁶ Thus, the Copyright Owners now have at least three sets of BMI materials – from Amazon, Apple, and Spotify – that no other Service can see.

That situation is untenable. Rebuttal submissions are due in less than two months. The Movants need full access to all relevant BMI materials well in advance of that deadline so their experts have sufficient time to review those materials and incorporate them into their benchmarking analyses as appropriate. By preventing the Movants from doing so, the Interim Order is causing significant prejudice and impeding the efficient progress of this proceeding. It is also fundamentally unfair to allow the Copyright Owners and their experts to gain one-sided access to basic benchmarking materials that all parties agree are relevant.

BMI’s non-opposition also supports the Movants’ position. The Movants have conferred with counsel for BMI – the only party the Interim Order seeks to protect – and BMI does not oppose the relief sought by Movants, provided that any relief granted does not prejudice BMI’s Motion for a Limited Modification of the Protective Order. It will not, because the Movants agree (while that motion remains pending) to continue to refrain from disclosing any BMI

⁶ The Movants and the Copyright Owners have disagreed over how to read the Interim Order, including whether it requires the Services to produce their BMI License Agreements to the Copyright Owners while they remain shielded from the other Services. But to resolve that dispute, the Movants recently produced their BMI License Agreements to the Copyright Owners, while withholding them from the other Services in accordance with the Interim Order.

License Agreements to the three Services that employ the three attorneys whose access BMI finds objectionable. Moreover, BMI never objected to Amazon’s or Apple’s outside counsel receiving these materials in the first place. Instead, the Movants were caught up in the Interim Order solely as a byproduct of what BMI itself described as an “exceedingly narrow” motion directed at “only three outside counsel” representing Google, Pandora, and Spotify.⁷ There is no good reason to apply that prohibition to the Movants, which the Judges should now make clear.

Google, Pandora, and Spotify have stated that they oppose this motion. Their objection is to BMI’s effort to force them to screen their lead counsel from seeing this benchmarking information. The Movants agree the Judges should decide the BMI Motion promptly so that all Services can review the BMI License Agreements. But there is no justification for subjecting the Movants to the Interim Order in the meantime. Indeed, the opposing Services do not actually object to the movants gaining access to these materials; their complaint instead is that all other Service counsel should *also* gain the same access. That may be true, but it offers no basis for opposing this motion. The Interim Order *already prohibits* the opposing Services from seeing the BMI materials that the Copyright Owners now possess. Modifying that order to give the Movants the same access as the Copyright Owners will not prejudice the other Services any more than they already are.

⁷ BMI’s Resp. to Services’ Sur-Reply in Further Opp. to BMI’s Mot. for Limited Modification to Protective Order in the *Phonorecords IV* Proceeding at 2 (Oct. 18, 2021). The three attorneys are Gary Greenstein (outside counsel for Google), Joseph Wetzel (outside counsel for Spotify), and Benjamin E. Marks (outside counsel for Pandora). *See also* BMI’s Reply in Supp. of its Mot. for Limited Modification to the Protective Order in the *Phonorecords IV* Proceeding at 2 (Sept. 28, 2021) (asserting that, “out of over twenty outside counsel for the Services in this proceeding, only three outside counsel” are subject to BMI’s Motion).

CONCLUSION

The Judges should promptly modify the Interim Order to permit Movants' outside counsel to access the BMI License Agreements materials consistent with this motion.

Dated: February 11, 2022

Respectfully submitted,

/s/ Joshua D. Branson

Joshua D. Branson (D.C. Bar No. 981623)
Aaron M. Panner (D.C. Bar No. 453608)
Leslie V. Pope (D.C. Bar No. 1014920)
Scott Angstreich (D.C. Bar No. 471085)
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel.: (202) 326-7900
Fax: (202) 326-7999
jbranson@kellogghansen.com
apanner@kellogghansen.com
lpope@kellogghansen.com
sangstreich@kellogghansen.com

Counsel for Amazon.com Services LLC

/s/ Mary C. Mazzello

Dale M. Cendali (N.Y. 1969070)
Claudia Ray (N.Y. 2576742)
Mary Mazzello (N.Y. 5022306)
Johannes Doerge (N.Y. 5819172)
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-6460
dale.cendali@kirkland.com
claudia.ray@kirkland.com
mary.mazzello@kirkland.com
johannes.doerge@kirkland.com

Counsel for Apple Inc.

Proof of Delivery

I hereby certify that on Friday, February 11, 2022, I provided a true and correct copy of the Amazon's and Apple's Motion to Immediately Modify the Judges' Interim Order Regarding BMI License Agreements to the following:

Google LLC, represented by Gary R Greenstein, served via ESERVICE at
ggreenstein@wsgr.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at
joe.wetzel@lw.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE
at susan.chertkof@riaa.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at
Bsemel@pryorcashman.com

Powell, David, represented by David Powell, served via ESERVICE at
davidpowell008@yahoo.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at
benjamin.marks@weil.com

Johnson, George, represented by George D Johnson, served via ESERVICE at
george@georgejohnson.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Signed: /s/ Joshua D Branson